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EVENT

AjV-Workshop: International Law and Domestic Law-Making Processes

University of Basel, Law Faculty, 4 September 2015

ALEXANDRA HANSEN — 4 September, 2015

Conference Report

When do domestic legislators legislate because of international law? When do national parliaments act as opposition in international law? More generally, how can the complex interplay between domestic legislatures and international law be analysed from different perspectives

(normative and empirical)? These (and other) issues were discussed at the international conference on "International Law and Domestic Law-Making Processes". The conference was held at the Law Faculty of the University of Basel on 4 September 2015 and was convened as an event of the Working Group of Young Scholars in Public International Law (Arbeitskreis junger Völkerrechtswissenschaftler*innen, AjV). It was organised by Evelyne Schmid and Tilmann Altwicker.

Domestic parliaments play a crucial role in the implementation of international law. In this endeavour, parliaments often enjoy considerable leeway. International norms often contain 'gaps' that need to be filled by domestic law-making. However, there are some international legal norms that are more 'statute-like' or those that establish minimum requirements which must be implemented, leaving little or no room for variation at the domestic level.

The complex interaction between domestic parliaments and the international legal order will become even more important in the future due to (still quite recent) developments in public international law: The amount of international norms has increased and the expectations by parts of the international community regarding the problem-solving power of international law are higher, such as in the fields of environmental law and security. How do the interactions between international law and domestic law-making processes complement, contest or mutually influence each other and what does it mean for the effectivity, legitimacy and role of international law in domestic legal orders?

The first panel to address these pressing questions dealt with the 'Parameters' of the intricate relationship between international and domestic law-making. Anna Petrig presented her work on "Designing a conceptual framework for the integration of secondary law in the (Swiss) domestic sphere". She focused on a specific kind of law, secondary treaty law by organs of international organisations, and raised the question as to how much room is left for national contribution in the development and implementation of such norms. Petrig held that democratic participation in the development of these norms is essential for there to be a sense of 'ownership' domestically.

Alexandra Birchler presented her paper on "State Responsibility and the legislative Branch – the current law of international state responsibility with regard to the legislature". She analysed if or how an omission of implementation of an international legal obligation by the domestic legislature invokes the international responsibility of the State concerned.

Matthew Saul talked about "The International Human Rights Judiciary and the Quality of Domestic Parliamentary Processes". He examined how international human rights bodies could improve the democratic processes on the national level. He argued that judicial or quasi-judicial bodies that monitor international human rights obligations should initialise the enhancement of domestic parliamentarian processes and would have the potential to improve the role domestic parliaments play in the realisation of human rights.

The commentator on these three papers, Thomas Kleinlein, summing up the panel presentations, introduced the idea of a 'diagonal dialogue', as opposed to a 'horizontal' or 'vertical

dialogue' between different stakeholders. He claimed that it was the dialogue between various courts and parliaments that might answer some of the questions raised by the three panellists. One must look at the substance of the laws and the procedures used to implement them. To him, the complexity of the interaction between domestic and international law could be somewhat resolved if there was a clearer notion of the substance of the international norms and rights. Then, the implementation processes could be adapted according to this notion and the norms would be democratically legitimised as more people would be involved in the dialogues.

The second panel on "Empirical Evidence" commenced with Charlotte Sieber-Gasser's presentation on "Democratic Legitimation of Trade Agreements in Switzerland". She spoke about the interplay between globalization and democracy, claiming that democratic representation is needed on an international level. The fact that global trade is continuously increasing and trade agreements cover an ever broader range of issues has led to deficits in the legitimation of these agreements at the national level and there is a conflict between democratic rights and economic interests.

Katrina Perehudoff presented "The Implementation of the human right to essential medicines in domestic legislation". She explored how the States continue to have much leeway as to the implementation of international law regarding access to health care and medicine as components of the right to health. She presented pilot results from an empirical study indicating that only two countries in the sample used take a rights-based approach to universal access to health care in domestic law.

The second panel concluded with a presentation on "Flexibility Mechanisms in Human Rights Treaties" by Gentiana Imeri. She explored human rights treaties quantitatively looking into the existence, design and use of flexibility mechanisms, such as derogations or reservations. Her empirical results suggest that customised treaty commitments are the rule rather than the exception and further research attempting to measure the effects of human rights treaties on domestic state practices should take this into account.

Ioana Cismas commented on the second panel and considered 'democracy' to be the main issue of the two preceding panels. The questions raised in the discussions also evolved around this concept. The flexibility regime that states can draw upon 'in the interest of democracy' (reservations, derogations, limitations) and 'democracy' itself may be at odds with each other at times, and in particular in the area of international human rights law. A genuine democratisation of international law would require more than simply an amplification of the voices of parliaments; such democratisation would have to be inclusive of minorities and respectful of their human rights and those of the majority.

The last panel addressed "Legislative Duties, State Discretion and Complex Cross-Boundary Phenomena". Nesa Zimmermann spoke about "Legislative for the vulnerable – special duties under the European Convention on Human Rights (ECHR)" and illustrated the European Court of Human Right's more recent approach to vulnerability – a newly created judicial approach (arguably) to adjust, i.a., the level of protection in cases of groups of people with special needs (e.g. migrants, minors). She noted that the Court has tended

to take a somewhat broader approach towards State's positive obligations stemming from the ESCR and has identified specific legislative duties in cases of vulnerability.

Branislav Hock presented his paper on "Who is in Charge? Appropriate Jurisdiction and Transnational Bribery". Hock explored how national law-makers should deal with the term 'appropriate jurisdiction' in the OECD Anti-Bribery Convention and what could be done about the lack of effective coordination mechanisms. He argued that the appropriate jurisdiction is the one balancing benefits and costs of both the extraterritorial enforcement and its coordination.

The last speaker of the conference was Giedre Lideikyte-Huber. Her presentation was about "National Sovereignty in Tax Matters: The Challenges of a Cross-Border Tax Evasion". Supranational taxes have a negative connotation because of sovereignty loss on the national level. Tax crimes like cross-border tax evasion require international cooperation and, thus, the domestic legislator is in the difficult position of trying to comply with international law whilst preserving national tax sovereignty.

Thomas Müller made the closing remarks on the third panel, discussing some overreaching aspects of the conference. The question of horizontality versus verticality seemed to play a predominant role during the whole conference. There seems to be a strong element of horizontality as the domestic legislators are often, but not always, left with only a small margin of appreciation. As the presentations demonstrated, the ways in which international law influences domestic law-making processes are manifold and have given rise to controversies that deserve nuanced

academic attention. The question now arises, whether the current situation should or could be changed and if so, how.

Conclusively, one can say that domestic law-making has become more complicated, because of the increase both in number and in regulatory density of international legal norms, the sometimes unclear provisions and the interaction between the different national and international actors. Any decision and action domestic law-makers take may resolve one problem but at the same time cause problems in other areas. More democratization on the national level, i.e. more involvement of the national population, will potentially cause conflicts with international law but more democratization on the international level might cause a setback in national democratic participation rights as the efficiency loss has to be compensated somewhere. How can we bring national democracy claims and international legal values into balance? Or is the concept of democracy overrated, i.e. has the time come for a new concept to evolve? The conference illustrated that the interaction between domestic legislatures on the one hand and international law-making on the other seems to have opened a new strand of international research. As the conference showed, the essential and complex interplay between the domestic legislatures and the international sphere lead to many new research questions. It may, thus, be worthwhile to shift the focus of international legal scholarship a bit, de-emphasizing the ever-present role of courts and paying more attention to the relationship between the international legal order and the domestic legislature.

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